No. 213.
By E. Toole, Bach, Brown & Henderson for D. C. (illegible)
FILED
DEC 9 1901
CLERK

In the Supreme Court

Filed Dec. 9, 1901.

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.
} No. 213.

NOTICE OF MOTION, MOTION TO DISMISS AND AFFIRM AND ARGUMENT.

E. W. TOOLE,
THOS. C. BACH,
ARTHUR BROWN,
H. P. HENDERSON,
Counsel for Defendant in Error.

H. S. Thurber & Co., Printers, Helena, Mont.

24730

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 213.

To Messrs. Charles J. Hughes, W. E. Cullen and E. C. Day, *Counsel for Appellants:*

Gentlemen: Please take notice that on Monday, the 30th day of December, 1901, at the opening of Court, or as soon thereafter as counsel can be heard, the motions, of which a copy is herewith served upon you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed is a copy of the brief of argument to be submitted with the motions in support thereof.

E. W. Toale
Thos. C. Bach
Arthur Brown
H. P. Henderson

Counsel for the Defendant in Error.

Due and timely service of the foregoing notice and of the following motions to dismiss the appeal herein and affirm the judgment, and receipt of a copy thereof, on this 30th day of November, 1901, is hereby admitted.

Dated: November 30th, 1901.

Chas. J. Hughes, Jr.
E. C. Day

Counsel for Plaintiff in Error.

Copy

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 213.

MOTION TO DISMISS AND AFFIRM.

Comes now the defendant in error, by E. W. Toole, Thomas C. Bach, Arthur Brown and H. P. Henderson, its attorneys appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the case was not one in which the jurisdiction of the court was at issue, nor one that involved the construction or application of the Constitution of the United States, nor one in which the constitutionality of the law of the United States, or validity or construction of any treaty made under its authority was drawn in question, nor one in which the constitutionality of a law of a state was

claimed to be in contravention to the Constitution of the United States, nor one in which any federal question whatsoever was involved, but was a case in which the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties to the suit or controversy being one a citizen of the United States, and the other an alien, a citizen of Great Britain, and the judgment was not given upon any federal question reviewable by this court, and that the judgment of the Circuit Court of Appeals was final so far as the question of review was concerned.

And the said defendant in error, by its attorneys aforesaid, also moves the court to affirm the said judgment of the Circuit Court of Appeals on the ground that it is manifest that said appeal was taken for delay only and that the question on which the jurisdiction depends is frivolous and does not need any further argument.

DATED: Nov. 30th, 1901.

E. W.
Thos.
Arthur
& H. P.

Attorneys for Defen

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

(No. 213.)

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS.

The complaint of the defendant in error, plaintiff below, was filed in the United States Court at Helena, Montana, to recover damages for trespass comitted upon a vein of rock in place bearing gold, silver and other precious metals, having its apex entirely within the premises of the plaintiff, described in the complaint. The name of the mining claim of the plaintiff was the St. Louis Quartz Lode. The complaint alleged that it was the owner of the premises of that mining claim, describing it by boundaries. It alleged that one of the veins belonging to the plaintiff dipped underneath the surface ground of the premises belonging to the defendant. That the defendant had entered upon a portion of that vein and extracted a large amount of ore therefrom; alleging the value of the amount so extracted. The complaint also stated at considerable length, and in detail, the direction and nature of the vein. The jurisdiction of the court, however, was invoked solely upon the ground that the plaintiff was a corpor-

ation of the state of Montana and that the defendant was an alien.

The answer practically was a general denial permitted by the practice of the State of Montana, and therefore in the federal practice, and also an allegation that the defendant had acquired the title by deed to a thirty-foot strip of compromise ground, adjoining the premises of the plaintiff on the east for a part of the length thereof; that it had acquired the same in pursuance of a previous contract by which plaintiff has been permitted to patent its claim of the St. Louis, and that the plaintiff was thereby estopped to enter upon the premises of the defendant. (Record p. 7.)

The issues thus presented were these:

1. Did the vein dip underneath the premises of the defendant?

2. Had the defendant extracted ore therefrom?

3. Was there a contract between the plaintiff such as would estop the plaintiff from bringing this action?

The plaintiff below, defendant in error, claims that no federal question was presented in either of these issues. That they are all the issues involved. Plaintiff in error claims, however, that because the description of the vein, for a trespass upon which this action is brought, is shown by the description of it to have entered at a side line, and it is claimed, though not conceded by the plaintiff in error, that it is shown to have passed out at another portion of this side line. The St. Louis claim was not a rectangle, but there was an angle in one side of the claim. It is claimed by the plaintiff below,

defendant in error, that in fact the vein entered at one end line and passed out at the other, though the hanging wall of it at places may have been near to and perhaps passed over and returned again, but the direction of that wall we consider immaterial for the motion here. (Illustrated by a map made a part of one of the briefs used by Defendant in Error in Circuit Court of Appeals.)

The evidence disclosed that the St. Louis Quartz Claim was an older claim than that of the defendant, which was called the Nine Hour Claim; that the St. Louis claim of the plaintiff was not located upon the vein involved in this case at all; that the vein upon which the St. Louis claim was located was called the St. Louis vein, and that the vein involved in this litigation was a portion of what is known as the Drum Lummon vein. That the plaintiff claimed title to it and to the ores in it as one of the "other" veins mentioned in the Statute, to which it was entitled so far as the apex was within its limits and so far as it had the right to follow.

The evidence also showed extensive trespasses, and so far as this case is concerned, was limited to that part of the vein lying northerly of what was known as the one hundred and eight foot plane. The court having ruled that for the twenty-five feet between the one hundred and eight foot plane and the one hundred and thirty-three foot plane, plaintiff could not recover. So that the question in this case of the right to recover for the twenty-five feet or jurisdiction of this court, relative to that section, is not involved. The defendant below, plaintiff in error, succeeded in that part of its contention. The plaintiff only recovered so much of the ores

as shown to lie northerly of the one hundred and eight foot plane.

Upon this state of facts plaintiff, defendant in error, claims that there was no federal question involved whatsoever for the following reasons:

1. That the suit having been brought on the ground that the plaintiff was a citizen of Montana and the defendant an alien, and for no other reason, and no federal question having been raised by the answer, the decision of the Circuit Court of Appeals became final under the statute and cannot be reviewed here.

2. That the right to recover upon the vein was simply what had been granted by patent and could not be reviewed here.

3. The effect of the compromise and deed was purely a question of construction of a contract and can never in any manner involve either a right under the law of the United States or the Constitution, or in any other thing which could be reviewed by this court.

BRIEF.

The jurisdiction of this court must depend upon the complaint. The review of the facts above stated shows that the complaint was simply trespass. The answer alleged no affirmative defense, except that of estoppel by deed and contract. The jurisdiction of the United States Court was originally obtained solely by reason of the allegation that the plaintiff was a citizen of the State and the defendant an alien. The

complaint did not hint at any other ground of jurisdiction and the answer did not affirm any.

The cases decided by this court are so recent that it is hardly necessary to quote from them. The leading case is that of Colorado Central Mining Co. vs. Turck, 150 U. S., 143, where the Court quotes from the opinion of the court in Metcalf vs. Watertown, 128 U. S., 588. The writ was dismissed upon the ground, as the court said:

"The jurisdiction of the Circuit Court was invoked, December 2, 1885, by filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The federal question now suggested did not emerge until the defendant set up its second defence, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication."

This was followed by the case of Borgmeyer vs. Idler, 159 U. S., 414, in which the court quotes the language of the Turck case.

In the case of Ex Parte Jones, 164 U. S., 691, the court again repeated the same rule, as follows:

"In this case the original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the

Act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgement of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship. Colorado Central Mining Co. vs. Turck, 150 U. S., 138; Borgmyer vs. Idler, 156 U. S., 408."

In 3d St. Ry. Co. vs. Lewis, 173 U. S., 457, the court say:

"It is thoroughly settled that under the act of August 13, 1888, c. 866, 25 St. 434, the Circuit Court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. Tennessee vs. Union and Planters' Bank, 152 U. S., 454; Metcalf vs. Watertown, 128 U. S., 586, 589; Colorado Central Mining Co. vs. Turck, 150 U. S., 138. If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And so when jurisdiction originally depends on diverse citizenship, the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings."

"Unless that appears by the plaintiff's statement to be a necessary part of his claim." What can that mean as applied to this case where it does appear that no question arose by

the complaint itself, but the jurisdiction was invoked solely on the ground of citizenship? No question arose by the answer, no question arose in the trial court; this entire record, from one end to the other, did not raise before the trial court any question exclusively federal in its nature. The issue discussed and argued on the trial was solely as to the effect of the contract and deed of the thirty-foot strip. Did that provide for vertical lines or lines parallel to the dip of the vein, or what was the construction of it? Those were the questions involved in the instructions of the court and requests to charge and arguments of counsel. There surely can be no federal question arising out of it. The right to follow the vein upon its dip underneath the surface ground of defendant was one that was given by a grant of the patent and was as much a part of the patent as a description of the land. This court cannot acquire jurisdiction to determine the extent of every patent of the United States. If that were the rule, every title to the lands which came by patent, and all titles in the western states did, would involve federal questions. It has been the constant rule of this court, through all the years of its organization, that the mere construction of a patent to the lands of the United States does not give jurisdiction to the United States court. De Lamars N. G. M. Co. vs. Nesbitt, 177 U. S., 525-527. Does it change it in any manner—that the nature of this patent is such that it would depend upon proof where the vein would extend? The mere fact that a right is acquired by the law of the United States does not give this court jurisdiction. That has been recently determined in the adverse claim cases, and one carefully considered so recently by this court.

Shoshone M. Co. vs. Rutter, 177 U. S., 505.
Blackburn vs. Portland G. Co., 175 U. S., 571.
Lowry vs. Silver City G. & S. Co., 179 U. S., 196.
Florida Central Railroad vs. Bell, 176 U. S., 321.

The assignment of errors, of the present plaintiff in error, which was prepared for it by the Circuit Court of Appeals, does not show any of the questions to be involved which are now claimed in their petition for error. The assignment of errors is found in the record, pp. 49-53, seventeen assignments in all. The first one is the only one from which it could be pretended that any of the questions now raised by the petition in error was involved. That assignment was upon an objection that the complaint did not state facts sufficient to constitute a cause of action. Why is not shown.

Moreover, the allegation of ownership is sufficient. The real ground of the demurrer actually urged was that the complaint was indefinite and uncertain by reason of the expression 'parallel end lines.' The provision of the Montana Code cited below, that although a demurrer may be interposed to a complaint upon the ground of uncertainty or that it is indefinite, still if the demurrer is not interposed on that ground, the same will be waived.

"See Sections 680 and 685 of the Code of Civil Procedure, hereinbelow given in full."

At page 16, folio 33, is to be found the action of the court consisted simply of the ruling of the court upon the general objection that the complaint did not state facts sufficient to constitute a cause of action, and which was overruled. And, to raise a federal question, the defendant in

that trial should have stated distinctly what federal question was involved and how. The other assignments relate to questions of evidence and methods of deraigning title. The plaintiff claimed to deraign its title by a discovery upon the St. Louis vein, and that it thereby acquired title to all other veins so far as the apex was within the premises; that the direction of the end lines was determined by the position of the St. Louis vein and not by the direction or position of the extra or other veins.

The plaintiff in its complaint had alleged that it was the owner of the vein in question. The defendant contended at great length, and nearly all the assignments of error in the Circuit Court of Appeals are to the effect that that allegation was not sufficient, and that the plaintiff should say why it was the owner and by what method it acquired title to the Drum Lummon vein. In other words, it must plead evidence of its title, to-wit: the discovery of the St. Louis vein, that it crossed the end lines of the St. Louis claim, that it dipped in the same direction as the Drum Lummon vein and that the Drum Lummon vein was an extra vein under the Statute. The plaintiff contended that the simple allegation of ownership was sufficient. That was a question of the construction of a practice act of the State of Montana, nothing else. What form the plaintiff takes in an action of ejectment depends entirely upon the law of the states, the United States Court simply following the state practice. That question of form of pleading cannot be reviewed in this court surely. Yet in the original assignments of error that is involved in the 2, 3, 4, 6, 7, 9 and 16 assignments. The effect of the compromise contract and

the compromise deed was the subject of nearly all the rest of the assignments of error, that is, the 5, 7, 11 and 12 assignments of error. The other questions involved in the assignments of error were questions of evidence not involving the construction of any statute. One as to whether plaintiff had the right to prove that defendant had entered upon the 400-foot level although it had not extracted ore therefrom, a question purely of evidence by the court. Another, the effect of defendant having taken out ore which it had not sold, but left piled up to go to waste.

These questions present nothing at all in the way of rights under the construction of the United States law or under the Constitution of the United States. It is by the petition in error, page 68, folio 133, that the plaintiff in error first attempts to raise these federal questions. It is there that we first hear that the court erred in holding that a vein (folio 134 "c") which enters and departs through the same side line of a claim has or can have extralateral rights under the laws of the United States.

For reasons which we have urged above we think it was not a federal question if it had been raised by the answer and insisted upon at the trial and determined at every stage of the procedure, but it never was raised by the answer, it was not raised upon the trial; it is only as the plaintiff in error heard of it incidentally through the dissenting opinion of one of the Circuit Court Judges, that it is first raised and now suggested in the way of a petition.

In addition to that which has been said above, we submit the following in support of our position that the complaint

does not show any "Federal Question", any "controversy between the parties in regard to the operation and effect of any law of the United States."

The action was commenced in the Circuit Court of the United States,—it was not commenced in a State court and removed to the Circuit Court. Therefore, as stated above, we must go to the complaint itself, and to no other pleading or paper, in order to ascertain the ground upon which the jurisdiction of the United States Court is based.

See Colorado Central M. Co. vs. Turck, 150 U, S., 138-143.

Turning, then, to the complaint, and confining ourselves to that pleading alone, we respectfully submit that it does not show a Federal Question, or any controversy concerning any law of the United States, as such Question or controversy must be stated, under the cases decided in this court.

See *Ex Parte* Smith, 94 U. S., 455.

That case was brought to recover possession of certain lands which the relators claimed under the Revenue Laws of the United States; that was the sole ground upon which jurisdiction was claimed. The court says: "In this case the jurisdiction is claimed on account of the subject-matter of the action, and not on account of the citizenship of the parties. It was incumbent upon the relators to show, in their pleadings or otherwise, that this action arose under the revenue laws of the United States. This they failed to do. They do show that they claimed title through such laws, but not that their title in that respect is disputed. For all that appears, Ander-

son may admit their title, and still contest their right to possession as against him. He may be their tenant, or he may be their grantee. There are no presumptions in favor of the jurisdiction of the courts of the United States." And it was held that the case was properly dismissed.

So in this case: It is true that defendant in error, in its complaint did show that it claimed title through the laws of the United States, but the complaint does not show that its title was in any manner disputed; from all that appears from the complaint, the plaintiff in error may have at all times admitted the title so asserted; may have been our tenant; may have claimed (in fact did claim in its answer, see paragraph 111 of answer, page 7) to be the grantee of the defendant in error; from all that appears from the complaint, the defendant below (plaintiff in error) may have denied the trespass—in fact, it does so deny (see paragraph II of answer, page 7). All of these questions are questions of fact, and the rights of the parties do not necessarily depend upon the construction of any statute of the United States (See cases cited above).

To the same effect is the following case:

Gold Washing & Water Co. vs. Keyes, 96 U. S., 199.

That case had been commenced in the State Court; and the defendant (plaintiff in error) sought to have the same removed on the ground of a Federal Question. The petition set out in full the title of defendant to two placer mining claims, which they claimed under the laws of the United States; and alleged that the determination of the case would necessarily involve and require the construction of certain

laws of the United States. The Court say: "The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

Sections of Montana Code of Civil Procedure referred to above:

"The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

Section 680:

"1. That the court has no jurisdiction of the person of the defendant, or the subject of the action.

"2. That the plaintiff has not legal capacity to sue; or,

"3. That there is another action pending between the same parties for the same cause; or,

"4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

"5. That causes of action have been improperly united; or,

"6. That the complaint does not state facts sufficient to constitute a cause of action; or,

"7. That the complaint is ambiguous, unintelligible, or uncertain."

Code of Civil Procedure, Section 685:

"If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

We respectfully submit that this appeal should be dismissed, and the judgment should be affirmed.

Ed O. Toole
Thos. C. Bach
Arthur Brown
J. H. P. Henderson

Counsel for Defendant in Error.

No. 214.

FILED
DEC 9 1901
JAMES H. McKENNEY
Clerk

Brf. of Toole, Bach, Bryant
Henderson for D. C. (on mo

In the Supreme Court

Filed Dec. 9, 1901.

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 211.

NOTICE OF MOTION AND MOTION TO DISMISS.

E. W. TOOLE,
THOS. C. BACH,
ARTHUR BROWN,
H. P. HENDERSON,
Counsel for Defendant in Error.

H. S. Tharbet & Co., Printers, Helena, Mont.

2474

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214.

To Messrs. Charles J. Hughes, W. E. Cullen and E. C. Day, *Counsel for Appellants:*

Gentlemen: Please take notice that on Monday, the 30th day of December, 1901, at the opening of Court, or as soon thereafter as counsel can be heard, the motions, of which a copy is herewith served upon you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed is a copy of the brief of argument to be submitted with the motions in support thereof.

E. W. Toole
Thos. C. Bach
Arthur Power
H. P. Henderson

Counsel for the Defendant in Error.

Due and timely service of the foregoing notice and of the following motions to dismiss the appeal herein and affirm the judgment, and receipt of a copy thereof, on this .....31st.....day of November, 1901, is hereby admitted.

Dated: November 31, 1901.

Chas. J. Hughes
W. E. Cullen E. C. Day

Counsel for Plaintiff in Error.

Copy

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error.

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214.

Comes now the defendant in error by E. W. Toole, Thomas C. Bach, Arthur Brown and H. P. Henderson, its attorneys appearing in its behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction :

1. Because no judgment has been rendered in this case against the plaintiff in error, but the action of the Circuit Court of Appeals was simply to grant a new trial upon certain issues, and no review can be had in this court until final judgment has been rendered.

2. Because the case is not one provided for by the

statute where a writ of error will lie to review an action of the Circuit Court of Appeals.

3. No federal question was involved or any right under the laws of the United States. No question of the constitutionality of the law of any State or of the United States, nor was there any question of the construction of the Constitution decided by the Circuit Court of Appeals.

DATED: Nov. 30, 1911

E. W. Earle

Thos. C. Back

Arthur Brown

H. P. Henderson

Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

(No. 214.)

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This case is the companion to No. 213, and is a review of a portion of the same judgment rendered in the trial court at Helena.

The complaint in the original action was one for trespass committed upon a vein alleged to belong to the plaintiff. The action for trespass described two sections of the vein, one lying north of the 108-foot plane, and one between the 108 and 133-foot plane, a section twenty-five feet in length along the vein, alleging that said vein dipped underneath the property of defendant, the Nine Hour claim. Although not in separate counts, the complaint described these two sections separately so that the effect was the same as if there had been two counts, one of the trespasses north of the 108 foot-plane and the other for trespass upon the twenty-five feet. The answer was the same to each, to-wit: A general denial

and an affirmative defense that the plaintiff had granted by contract to secure its patent and afterwards by deed enforced, by decree of the court, a thirty-foot strip along a portion of its side line (See diagram, page 50, thirty-foot strip A-E and D-C). On the trial the court held that plaintiff could not recover for the 25-foot section between the said two planes, but held that it could recover northerly of the 108-foot plane. A verdict was rendered in favor of plaintiff northerly of that plane, and in favor of defendant as to the twenty-five feet, thus each party was defeated in some part of its contention. Each party procured the settlement of a Bill of Exceptions in the same case. The defendant sued out its writ of error and brought the case to hearing, reported in the decision against it, before the Circuit Court of Appeals (102 Federal, 430). Subsequently and while the first writ of error was pending, the plaintiff, defendant in error, sued out a writ of error which was reviewed by the Circuit Court of Appeals, as appears by the decision in this case, (104 Federal, 664). In the second review, that taken by the plaintiff, the court simply granted a new trial, which has not yet been heard. Before the remittitur could issue and the trial be had in the circuit court this writ of error had been sued out. Defendant in error now claims, for ground of dismissal, the same as in No. 213, to-wit:

1. That the suit having been brought on the ground that the plaintiff was a citizen of Montana and the defendant an alien, and for no other reason, and no federal question having been raised by the answer, the decision of the Circuit Court of Appeals became final under the statute and cannot be reviewed here.

2. That the right to recover upon the vein was simply what had been granted by patent and could not be reviewed here.

3. The effect of the compromise deed was purely a question of construction of a contract and can never in any manner involve either a right under the law of the United States or the Constitution or any other thing which could be reviewed by this court.

4. And also this defendant in error says that this court will not review a decision which simply grants a new trial. It does not yet appear that defendant, plaintiff in error, is or will be aggrieved,—it is not injured until judgment is rendered.

BRIEF.

On the subjects involved in No. 213 we submit the same brief without repeating it here.

On the subject that an order granting a new trial is not reviewable by a writ of error we refer to the following cases of this court:

Grant vs. Insurance Co., 106 U. S., 429.

Bostwick vs. Brinkerhoff, 106 U. S., 3.

If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.

Brown vs. Union Bank, 4 How., 465.

Pepper vs. Dunlap, 5 id., 51.

Tracy vs. Holcomb, 24 id., 426.

Moore vs. Robbins, 18 Wall., 588.

McComb vs. Knox County, 91 U. S., 1.

Baker vs. White, 92 id., 176.

Davis vs. Crouch, 94 id., 514.

Railway Co. vs. Swasey, 23 Wall., 405.

The Palmyra, 10 Wheaton, 502.

St. Louis, Iron Mt. & Southern Ry. Co. vs. Express Co., 108 U. S., 24.

Perkins vs. Fourniquet et al., 6 Howard, 206.

Postal Telegraph Cable Co. vs. Southern Ry. Co., 90 Fed., 211.

Though the merits of the cause have been substantially decided while anything, though formal, remains to be done, this court cannot pass on the subject.

Insurance Co. vs. Adams, 9 Pet., 591.

There was something much more than formality in this case; there is a judgment to be had against this defendant, plaintiff in error, before it has a right to complain.

E. W. Earle,
Thos. C. Back
Arthur P. Brown
A. P. Henderson

Counsel for Defendant in Error.